No. 22507

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT J. DAVIS,

Appellant,

v.

EVERETTE H. WILLIAMS,

Appellee.

Appeal from the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

APPELLANT'S REPLY BRIEF

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REPLY TO APPELLEE'S STATEMENT OF THE CASE

It is unnecessary to reply to appellee's statement of the case except to state that appellee's observation that appellant's statement contains irrelevant and immaterial matters is not correct. Appellant's full and complete statement of the case is necessary for a proper analysis and interpretation of the transaction and the documents utilized therein.

SUMMARY OF REPLY ARGUMENT

The Davis December 13, 1963 agreement, which was identical with the DuBay July 31, 1962 agreement, must be construed in the light of the course of dealing relating thereto. As thus construed it must be deemed to have been modified so as to have waived or eliminated the need of formal assignments of accounts receivable, and merely have required lists of accounts receivable subject to a security interest in favor of Davis. Independently thereof the lists should be regarded as security agreements—they are designated as accounts receivable assignments, import grant and satisfy the requirement for a signing. Further future charges to the specifically named advertising accounts receivable assignments and circulation accounts receivable were covered.

The assignment of account receivable balances created within four months of the filing of the involuntary petition in bankruptcy did not constitute a preference under the Bankruptcy Act.

Appellant's claim is not rendered invalid either because paragraph 7 of the Davis December 13, 1963 agreement provided that the Portland Reporter Publishing Company remained the "sole owner" of the accounts receivable and their proceeds until default. Nor is the claim invalid on the ground that the accounts receivable belonged to the Portland Newspaper Publishing Company, Inc., the bankrupt, as distinguished from the Portland Reporter Publishing Co., Inc., the original debtor, which was merged into the bankrupt.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. 1

Appellee's answer to specification of error No. 1 makes clear that appellee is either unable or unwilling to recognize the import of the appellant's argument. Appellee must be of the view that the Uniform Commercial Code is to be applied in a highly technical fashion and accordingly seeks to examine, construe and interpret the documents in a vacuum and with complete disregard for the background and circumstances of the particular transaction. Further, appellee implies that appellant seeks "a sympathetic consideration of particular facts" because of the "assistance of a 'public-spirited citizen' to a struggling business" (Br. p. 5). There is no plea by appellant for "sympathetic consideration" of a charitable nature as thus implied. Appellant simply asserts that the documents and the transaction must necessarily be viewed in the light of the circumstances which obtained, and further, that in the process, the clear intent of the Code, as set forth in U.C.C. § 1-102(1) thereof that "This Act shall be liberally construed and applied to promote its underlying purpose and policies" be kept in mind.

Specifically, appellee argues that appellant is attempting to utilize a course of dealing to create a security agreement where there is none and that assignment forms were not used as specifically required by the underlying Davis agreement of December 13, 1963, secondly, that the memoranda and lists of February 24 and April 21, 1964, and particularly

that of April 21, do not constitute security agreements in that they do not contain words of grant and are not signed, and thirdly, that neither future charges to named advertising accounts nor circulation accounts are covered.

First, appellee argues that appellant can not be aided by the course of dealing and course of performance with respect to the DuBay agreement and the parties' understandings thereto, in part because the trustee contends the DuBay agreement is invalid and the Davis agreement is on a parity with it.

That the DuBay agreement may be invalid does not adversely affect Davis' contention based upon the course of dealing relative thereto. (The DuBay agreement, which was entered into prior to the enactment of the code, was deemed invalid by the referee because of the doctrine of *Benedict* v. *Ratner*, 268 U.S. 353, 45 S. Ct. 566, 69 L. Ed. 991 (1925), which prevailed at that time.) Appellant's contention is that the course of dealing modified the DuBay agreement and made unnecessary the execution of specific and formal assignments as originally contemplated by the DuBay agreement. In other words, notwithstanding the specific provisions of paragraph 2 of the DuBay July 31, 1962 agreement—and likewise paragraph 2 of the Davis December 13, 1963 agreement—that accounts receivable be assigned by "a proper instrument in writing, a form of which is attached hereto" the effect of the practice which was in fact followed by DuBay and the Portland Reporter was to modify the original agreement so that the requirements of such

paragraph either were waived or were met by the mere supplying of a list. (See argument, Appt. Br. p. 19-25) and quotation from and discussion of In re Bengston, 3 UCC Rep. 283 (D.C., Conn., Ref. Op. 1965) in Appendix hereto which through error was omitted from Appendix to Appellant's Opening Brief.)

This does not constitute seeking to create a security agreement. The security agreement in the first instance consisted of the basic agreement and the assignment—in the case of DuBay the agreement of July 31, 1962 and the assignment of that date, and in the case of Davis the agreement of December 13, 1963 and the assignment of that date. Subsequently the security agreement consisted of the basic agreement plus the subsequent lists. The situation is as if the Davis December 13 agreement either were incorporated in the lists of February 24 and April 21 or as if that agreement was the basic and continuing security agreement with the lists merely serving the function of designating the specific accounts receivable, both advertising and circulation, covered by such continuing security agreement.

Secondly, the trustee contends that the lists do not constitute security agreements because they are not in the form of the assignment, a copy of which was attached to the December 13, 1963 agreement, do not contain words of grant and are not signed.

This contention overlooks the argument just made as to why such formal assignments are unnecessary. Also, it disregards and rejects appellant's contention,

elaborated upon in his brief, (Appt. Br. p. 25-32) that the memoranda are designated as accounts receivable assignments and that the headings and other language contained therein import a grant.

The trustee then indulges in a complete non sequitur (Br. p. 7) and observes that if the memoranda imports grant then appellant could also argue that the financing statement filed would be sufficient as a security agreement since it includes words such as "accounts receivable." Appellant has not even suggested or intimated, let alone argued, that a financing statement—at least one which does not also meet all of the requirements of a security agreement—dispenses with the need of a security agreement or that the financing statement in this instance did so. Appellant concedes that a security instrument is necessary.

The cases, *American Card Company* v. *H.M.H. Co.*, 97 R.I. 59, 196 A.2d 150 (1963) and *Scott* v. *Stocker*, 380 F.2d 123 (10 Cir. 1967) cited by the trustee, as well as his observation, are beside the point. All that the *American Card Company* case holds is that a financing statement which does not contain the debtor's grant of a security interest can not serve as a security agreement.

Scott v. *Stocker* holds that a pre-code agreement filed after the effective date of the code could not validate a floating lien which was invalid under pre-code law, and that to create a valid security interest there must be a security agreement as well as a financing statement, a view with which appellant agrees.

Other cases cited by him, *In re Fernandez Welding and Equipment Service, Inc.*, 5 U.C.C. Rep. 1, — F.2d — (1 Cir. 1968) and *In re Vielleux*, 5 U.C.C. Rep. 277 (D. Conn., Ref. Opp. 1967) are inapposite. The documents involved in those cases were promissory notes, designed as such and not used or purported to be used as security agreements.

As to the lack of signature, appellant reiterates his argument commencing on page 27 of his opening brief. The fact that the reported cases dealing with the question of what constitutes a signing are those involving financing statements does not detract from the construction and determination of what amounts to a signing under the code. The determination of this question is the same whether the instrument is a financing statement, a security agreement or some other document.

Mid-Eastern Electronics, Inc. v. *First National Bank*, 380 F.2d 355 (4 Cir. 1967), cited by appellee (Br. p. 10), U.C.C. § 9-203 (ORS 79.2030) admittedly speak of a signed writing and the need of a debtor having signed a security agreement. However, they do not state or treat of what constitutes signing. Appellant has not contended that the signing of a security agreement is unnecessary. What appellant has urged and argued is that the typewritten name of the debtor "FROM: KEITH PLOTNER, CONTROLLER" on memoranda addressed to the Board of Directors of the debtor and the creditor constituted a signing.

Thirdly, are the future charges to the specifically

designated advertising accounts receivable and all circulation accounts and the future charges to all circulation accounts receivable covered? The trustee has asserted that the only accounts receivable in which appellant obtained a security interest were the balances existing in the specifically designated advertising accounts on December 13, 1963 when the Davis agreement and the formal assignment of that date were executed. Presumably, if the memoranda of February 24 and April 21, 1964, either independently or with the aid of the Davis agreement of December 13, 1963, be held to constitute security instruments, then it would be the trustee's position that only the existing balances owing on the advertising accounts specifically designated in such lists on the dates thereof would have been covered.

Appellant has discussed this issue at some length in his opening brief at pages 35 to 39 to which reference is made. It is sufficient at this point to repeat the following observations.

(1) If the trustee's contention is valid then appellant's security interest would have immediately been extinguished and eliminated by the payment of such balances and would have been reduced pro tanto by the making of any single payment; and this result would follow even though additional charges were made to such accounts either before, simultaneous with or after the payments and even though the balances were greater after such payments and charges than prior thereto. This would have made for an im-

possible situation and the preservation of appellant's security interest would have required, according to trustee's position, a new formal assignment of a newly created account receivable balance each time any payment was made upon any specifically designated advertising account. Such a forced and arbitrary construction is untenable.

(2) The specific designation of particular advertising accounts receivable precluded appellant obtaining a security interest in other advertising accounts receivable. However, it clearly follows from paragraph 1 of the Davis December 13, 1963 agreement, and the intention thereof, as indicated by its language, that the fluctuating balances from time to time of such accounts receivable and not the specific balances of such accounts receivable on a specific date were covered. This necessarily means that future charges to the specifically designated accounts receivable and not merely the balances on the dates of the lists were subject to appellant's security interest.

(3) While the Davis December 13, 1963 agreement made no reference to circulation accounts, the assignment and the list of that date attached to said agreement at the time of its execution were a part thereof. The list and the testimony relative thereto (Tr. pp. 69-70) make transparently clear that to provide appellant with the security contemplated, namely $35,000 of accounts receivable, the inclusion of circulation accounts was necessary. The agreement must be deemed modified accordingly to include circulation accounts.

(4) The meaning of "circulation accounts" is clear—it was clear to the parties and the term is clear to anyone having the slightest knowledge of newspaper operations. Moreover, the term "circulation accounts receivable" is included within the generic term "accounts receivable." Further, all circulation accounts were covered. The Referee and the District Judge had no difficulty in determining that accounts receivable, in the case of Rose City Development Company, Inc., included all advertising accounts receivable. There should be no difficulty in likewise determining that circulation accounts receivable includes all circulation accounts receivable, particularly when it is noted that where it was intended to cover less than all advertising accounts receivable, specific accounts recceivable were designated.

Appellant argued in his opening brief, and repeats his argument (Appt. Br. p. 34), that the accounts receivable in which he had a security interest consisted of (a) certain specifically designated advertising accounts receivable and their fluctuating balances from time to time, and, (b) all circulation accounts receivable and their fluctuating balances from time to time, provided, however, that appellant could reach only that amount of the circulation accounts receivable balances as was specified in a particular list. This means on the basis of the April 21 memorandum appellant had a security interest in all balances of all circulation accounts receivable, but that he could not realize therefrom more than $18,752.56, the amount specified in the April 21 memorandum. However, ap-

pellant has urged that if the April 21 memorandum be deemed ineffective, the trustee having conceded (Br. pp. 4-5) that the December 13, 1963 agreement and the assignment attached thereto did create a valid security agreement, appellant must of necessity, the December 13, 1963 list being a part of the assignment, have a valid security interest in all balances of all circulation accounts and must recover not less than $7,837, the amount specified in the list attached to the agreement and assignment of December 13, 1963.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. 2

Trustee's answer to specification of error No. 2 consists of the incorporation of the trustee's argument in his brief in Appeal No. 22507-A, *Everette H. Williams, Appellant,* v. *Rose City Development Company, Inc., Appellee.* It is appellant's position that the extension of his security interest to new charges to accounts receivable covered by the security agreement, which charges came into existence within four months of the commencement of the bankruptcy proceedings was not preferential. With reference to this issue and in support of his position, appellant restates the argument in his opening brief (Appt. Br. pp. 39-54) and incorporates by reference herein the arguments contained in the brief amicus curiae of the Permanent Editorial Board for the Uniform Commercial Code and the argument in the answering brief of appellee in the same appeal, Appeal No. 22507-A.

REPLY TO APPELLEE'S OTHER REASONS FOR CONTENDING THAT APPELLANT'S CLAIM IS NOT SUSTAINABLE

Appellee sets forth two additional reasons which "Appellant has not dealt with" for contending that appellant's claim must fail. The first is that the December 13, 1963 agreement "specifically provides that until default, the assignor remains the *sole owner* of the accounts and their proceeds" (Br. p. 15), and the second is that appellant has no valid perfected interest in the accounts receivable whose proceeds were collected and which are in issue because these accounts receivable belonged to the Portland Newspaper Publishing Company, Inc., Bankrupt, as distinguished from The Portland Reporter Publishing Company, Inc., the original debtor.

As to the first of these reasons, it is somewhat surprising that it is even advanced. It is the very essence of a security interest that the asset in which the creditor claims such interest is owned by the debtor and not the creditor. Any ownership interest in a creditor, that is, a title interest as distinguished from a lien or security interest, has been eliminated by the Uniform Commercial Code itself. Thus the Uniform Commercial Code in Section 9-102(2) (ORS 79.1020(2)) specifically provides that Article 9 applies to security interests created by, among other instruments, conditional sales, trust receipt and other title retention contracts.

The language in paragraph 7 of the Davis December 13 1963 agreement stating that until default the

assignee shall not be entitled to the proceeds from any account periodically collected and that the same shall remain the sole property of the assignor, is in no way inconsistent with a security interest in appellant. It was solely to insure that the proceeds could be utilized by the debtor for its purposes until default —in other words, that the creditor could not proceed against the security until there was default.

With reference to the second new issue based upon the distinction between the bankrupt and the original debtor, the trustee incorporates his argument in his opening brief in Appeal No. 22507-A, *Everette H. Williams, Appellant,* v. *Rose City Development Company, Inc.*, and the trustee's argument is answered both in the appellee's brief and in the brief amicus curiae filed in that appeal. Appellant incorporates by reference the arguments in the answering briefs. In addition to the cases cited by appellee in No. 22507A, see *Eureka-Carlisle Company* v. *Rottman,* C.C.H. Bankruptcy Law Report § 62,866 — F.2d — (10th Cir., August 15, 1968) in which the following appears:

> "Eureka did not raise before the Referee or the District Court the issue whether it was entitled to a setoff, nor was the question considered or referred to, either directly or indirectly. In such circumstances, ordinarily an appellate court will not consider a question of law or fact which was not presented to, considered or decided by the trial court. This is well settled and the Tenth Circuit is in accord with the general rule established by many authorities. *Justheim Petroleum Co.* v. *Hammond*, 227 F.2d 629, 633 (10th Cir. 1955); and

Dubuque Fire & Marine Ins. Co. v. *Caylor*, 249 F.2d 162, 165 (10th Cir. 1957). . . ."

Independently thereof appellant wishes to note that Portland Reporter Publishing Company, Inc. did not cease to exist but was merely merged into the Portland Newspaper Publishing Company, Inc., that there was no sale and purchase of assets, nor any interruptions in the operations and the publication of the newspaper known as THE PORTLAND REPORTER—(there was an unrelated cessation of publication for a single day more than a month prior to the merger). The operations were continued under the commonly known name of the Portland Reporter and the newspaper continued to appear under that name.

The name of the merged corporation, the Portland Newspaper Publishing Company, Inc., the Bankrupt, was not generally known. Persons dealing with the enterprise dealt with it under the name of The Portland Reporter, the name of the newspaper. Creditors dealing with the Enterprise dealt with it by that name, and had inquiry been made by a creditor of the Corporation Commissioner as to the existence of financing statements the inquiry would, in all probability, have been made with reference to The Portland Reporter and not the Portland Newspaper Publishing Company, Inc. No creditor was or could have been misled. The case of *In re Excel Stores, Inc.*, 341 F.2d 961 (2 Cir. 1965), in which the Court held under the provisions of U.C.C. § 9-402(5) that the designa-

tion of the debtor in the financing statement as "Excel Department Stores" when its proper name was Excel Stores, Inc. was not too misleading, would seem to be decisive of this issue.

CONCLUSION

On the basis of the foregoing and appellant's opening brief, the Order of Judge Solomon should be reversed and the Court should direct that judgment be entered specifically recognizing the validity of appellant's security interest in the advertising accounts receivable specifically designated in the April 21, 1964 list and in all circulation accounts and the proceeds thereof.

Respectfully submitted,

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APPENDIX

The following was omitted from Appendix to Appellant's Opening Brief.

In further support of this contention see the following from *In re Bengston*, supra, at p. 289:

> "The agreement is defined in Section 42a-1-201(3) as the bargain between the parties 'as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in Section 42a-1-205 and Section 42a-2-208.'
>
> "The official comment as to Section 42a-1-205 headed 'Course of dealing and usage of trade' includes the following:
>
> > " 'This section makes it clear that; " '1) This act rejects both the "lay-dictionary' and the 'conveyancer's' reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.'
>
> "The Official Comment to Section 42a-2-208 headed: 'Course of performance of practical construction' recites in part:
>
> > " '1) The parties themselves know best what they have meant by their words of agreement and *their action under that agree-*

> *ment is the best indication of what that meaning was.* This section thus rounds out the set of factors which determines the meaning of the 'agreement.'

"The conditional sales contract does not, in fact, comply technically with the provisions of Section 42-84(b)(8) which requires that the number of payments and the amount and date of each payment be set out. However, Section 42a-2-201 dealing with formal requirements states subsection (1) '. . . A writing is not insufficient because it omits or incorrectly states a term agreed upon. . . .' The only penalty provided in the statutes for failure to comply with the provisions of the Connecticut Retail Installment Sales Financing Act (Conn GS Section 42-83 thru Section 42-100) are those set out in Section 42-99 and Section 42-100, to wit: the nonrecovery of any finance, delinquency or penalty charge and/or the payment of a criminal fine. The contract is not otherwise void or voidable and as between the parties is enforceable, at least to the extent of a recovery of the selling price and the validity of security interest if it is otherwise properly perfected. This is emphasized by Section 42a-9-203 (2) which provides:

> " 'A transaction, although subject to this article, is also subject to . . . Sections 42-83 to 42-97 inclusive and 42-99 . . . Failure to comply with any applicable statute has *only* the effect which is specified therein.' (emphasis added)

"Although the present unpaid balance on the Coca-Cola Bottling machine was not put in evi-

dence, *the parties unquestionably understood the terms of the agreement which at the time of bankruptcy had been in effect for approximately two years, during which time there was no apparent difficulty between the parties in interpreting their agreement.* (Underscoring supplied)

"Section 42a-2-208 provides:

" '1) Where the contract for sale involves repeated occasions for performance and opportunity for objection to it by the other, *any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.*

" '2) The express terms of the agreement and any such course of performance as well as any course of dealing and usage of trade, shall be construed whenever reasonable is consistent with each other.'

The comment on this section was quoted above.

"*Applying these criteria it is abundantly clear that the parties understood the agreement they made, they conducted themselves without objection under the agreement for a long period of time and a 'liberal construction of the act' applied to promote its underlying purposes and policies dictates that the security agreement be found valid as against the trustee.*" (Emphasis supplied)

Although Article 2 deals with Sales rather than Secured Transactions, the document involved in *In re Bengston* and construed by the Court in the light of the course of dealing and practice of the parties was a conditional sales contract and utilized as a security agreement. It is submitted that by analogy to the

foregoing and by a similar line of reasoning, the Davis agreement must be viewed in the light of the course of conduct followed pursuant to it and also to the DuBay agreement, with which it was in all material respects identical. When so viewed it must be construed as not requiring the execution of formal assignments but as being satisfied, insofar as effecting valid assignments, by the mere submission of schedules or lists of designated accounts receivable.